A

ARUMUGAM v. PP

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: N-05-358-12-2014]
11 JANUARY 2016

C ***CRIMINAL LAW:*** *Murder – Motive – Appeal against conviction and sentence – Accused quarrelled with deceased and hit deceased with piece of wood – DNA profile of deceased detected on alleged murder weapon and jeans worn by accused – Whether there was sufficient evidence to link accused to murder weapon – Whether motive relevant – Whether accused had motive to kill deceased – Whether circumstantial evidence pointed to culpability of accused – Penal Code, s. 302*

D ***CRIMINAL PROCEDURE:*** *Charge – Reduction of – Accused charged for murder under s. 302 of Penal Code – Accused quarrelled with deceased and hit deceased with piece of wood – Defence of denial – Whether accused had motive to kill deceased – Appeal to reduce original charge of murder to culpable homicide not amounting to murder – Nature of injuries sustained by deceased – Whether showing intention to cause serious bodily injury to deceased – Whether death was probable result –*
E *Penal Code, ss. 302, 304(a)*

EVIDENCE: *Circumstantial evidence – Murder – Accused quarrelled with deceased and hit deceased with piece of wood – Incident witnessed by eyewitness – Forensic evidence that deceased was hit with blunt object – DNA profile of deceased detected*
F *on alleged murder weapon and jeans worn by accused – Whether there was sufficient evidence to link accused to murder weapon – Nature of injuries sustained by deceased – Whether showing intention to cause serious bodily injury to deceased – Whether circumstantial evidence pointed to culpability of accused*

EVIDENCE: *Witness – Eyewitness – Credibility – Accused charged for offence of*
G *murder – Accused quarrelled with deceased and hit deceased with piece of wood – Eyewitness testified that deceased sustained injuries after falling down three times – Eyewitness changed testimony after refreshing memory – Whether eyewitness trustworthy and credible*

The appellant had a quarrel with his father ('the deceased') which led to the
H former hitting the latter with a piece of wood ('exh. P11A'). The assault was witnessed by the appellant's grandmother ('SP6') but she fled the scene out of fear. A post mortem carried out by a forensic consultant ('SP2') revealed that the cause of the deceased's death was due to blockage of the trachea as a result of bleeding and inhaling the blood which was caused by considerable
I force of blunt trauma to the deceased's face. The government chemist ('SP8') confirmed that the DNA profile of the deceased was detected on exh. P11A and the jeans that the appellant was wearing during the fight ('exh. P7E(i)'). The appellant was charged for murder at the High Court, an offence under

s. 302 of the Penal Code. SP6 was the sole eyewitness in this case. At the beginning of her evidence in examination-in-chief, SP6 testified that the deceased sustained his injuries as he fell down three times with his face smashed on the floor. Upon refreshing her memory, SP6 changed her testimony by saying that the deceased was assaulted by the appellant with exh. P11A. However, SP6 could not identify exh. P11A as being the weapon used to assault the deceased. In his defence, the appellant denied hitting the deceased with the wood. The appellant submitted that he was drinking liquor outside the house when heard the deceased falling down on the floor three times, hitting his head on a wooden table. The appellant saw the deceased lying on the floor covered with blood but did not render any assistance. At the end of the trial, the appellant was found guilty, convicted and sentenced to death by the trial judge. Hence, the present appeal. The issues that arose for the court's determination were: (i) whether SP6 was a credible witness; (ii) whether the appellant had a motive to kill the deceased; (iii) whether there was sufficient evidence to link the appellant with exh. P11A; and (iv) whether the trial judge failed to consider that the appellant and the deceased were intoxicated when the incident took place. Alternatively, the appellant prayed that the original charge of murder under s. 302 of the Penal Code be reduced to one of culpable homicide not amounting to murder under s. 304(a) of the same Code.

Held (dismissing appeal; affirming conviction and sentence)
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) The trial judge had carried out a maximum evaluation of the evidence adduced by the prosecution, including the evidence of SP6. There was no doubt that SP6 was an important eyewitness for the prosecution. SP6's evidence was found to be trustworthy and credible. This was a question of fact involving the credibility of witness. It was within the province of the trial judge and the appellate court is slow to intervene. (paras 32 & 33)

(2) Ordinarily, a motive for committing a crime is not an ingredient of the offence of murder. However, if it could be established, especially where the prosecution's case was solely based on circumstantial evidence, it would be an essential factor that ought to be considered. In this case, the prosecution's case did not rest entirely on circumstantial evidence. The prosecution's case consisted of direct evidence of SP6, who was the eyewitness and the medical evidence of the deceased given by SP8, connecting the appellant with the commission of murder of the deceased. A non-production of the evidence to prove the motive of the crime was not really relevant and important in the circumstances of this case. (paras 22 & 23)

(3) According to SP2, the injuries to the head and the face of the deceased were inflicted with considerable force and exh. P11A could have caused the injuries and the chances of survival were slim. The DNA profile of the deceased was detected on exhs. P11A and P7E(i). As exh. P7E(i) was stained with the DNA profile of the deceased, it was reasonable to infer that the appellant had come into physical contact with the deceased. Exhibit P11A was also stained with human blood which SP8 confirmed to be that of the DNA profile of the deceased. It was reasonable to conclude that exh. P11A was the murder weapon. The evidence of SP6 confirmed this. Furthermore, the nature of the injuries sustained by the deceased showed the intention of the appellant to cause serious bodily injury to the deceased. (paras 29, 30, 31 & 34)

(4) In the appellant's defence, he totally denied assaulting the deceased. In other words, what he was saying was that there was no violent or physical contact between him and the deceased. That being the case, the appellant's drunkenness, if any, had no connection to the death of the deceased. Thus, the stand taken by the appellant in his defence did not warrant the trial judge to consider the issue of the appellant's intoxication. No miscarriage of justice had occasioned upon him in the circumstances of this case (para 37)

(5) Whether the offence is culpable homicide or murder depends upon degree of risk to human life. If death is the likely result, it is culpable homicide. If death is the probable result, it is murder. Based on the serious injuries sustained by the deceased and the circumstances under which the offence was committed, there were no cogent reasons to reduce the original charge of murder to a lesser charge of culpable homicide. (paras 38 & 39)

Bahasa Malaysia *Headnotes*

Satu pergaduhan berlaku antara perayu dengan bapanya ('si mati') dimana perayu memukul si mati dengan sebatang kayu ('eks. P11A'). Serangan tersebut disaksikan oleh nenek perayu ('SP6') tetapi SP6 melarikan diri kerana ketakutan. Satu bedah siasat oleh pakar forensik ('SP2') mendedahkan bahawa si mati meninggal dunia akibat saluran trakeanya tersumbat ekoran pendarahan dan sedutan darah yang diakibatkan oleh pukulan trauma tumpul yang agak kuat pada muka si mati. Ahli kimia kerajaan ('SP8') mengesahkan DNA profil si mati dikesan pada eks. P11A dan jeans yang dipakai oleh perayu semasa pergaduhan ('eks. P7E(i)'). Perayu dipertuduh kerana membunuh di Mahkamah Tinggi, satu kesalahan di bawah s. 302 Kanun Keseksaan. SP6 adalah satu-satunya saksi mata kes ini. Dalam pemeriksaan utama, SP6 pada awalnya mengatakan bahawa si mati tercedera apabila jatuh tersembam ke lantai sebanyak tiga kali. Setelah teringat semula, SP6 mengubah keterangannya dengan mengatakan si mati diserang oleh perayu dengan eks. P11A. Walau bagaimanapun, SP6 tidak dapat mengecam

eks. P11A sebagai senjata yang digunakan untuk menyerang si mati. Dalam pembelaannya, perayu menafikan memukul si mati dengan eks. P11A. Perayu mengatakan bahawa dia sedang minum arak di luar rumah apabila dia terdengar si mati jatuh ke lantai sebanyak tiga kali hingga kepalanya terhantuk pada meja. Perayu melihat si mati terbaring di atas lantai berlumuran darah tetapi dia tidak membantu si mati. Pada penutup perbicaraan, perayu didapati bersalah, disabitkan dan dijatuhkan hukuman mati oleh hakim bicara. Oleh itu, rayuan ini. Isu-isu berbangkit untuk diputuskan oleh mahkamah adalah: (i) sama ada SP6 seorang saksi yang boleh dipercayai; (ii) sama ada perayu mempunyai motif untuk membunuh si mati; (iii) sama ada terdapat keterangan mencukupi untuk mengaitkan perayu dengan eks. P11A; dan (iv) sama ada hakim bicara gagal mempertimbangkan bahawa perayu dan si mati mabuk ketika kejadian tersebut berlaku. Secara alternatif, perayu memohon agar pertuduhan asal iaitu membunuh di bawah s. 302 Kanun Keseksaan dikurangkan kepada pertuduhan mematikan orang secara salah yang tidak terjumlah kepada membunuh di bawah s. 304(a) Kanun yang sama.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah menilai keterangan yang dikemukakan oleh pihak pendakwaan secara maksimum, termasuk keterangan SP6. Tiada keraguan bahawa SP6 adalah saksi mata yang penting bagi pihak pendakwaan. Keterangan SP6 didapati jujur dan boleh dipercayai. Ini satu persoalan fakta melibatkan kebolehpercayaan saksi. Ini termasuk dalam bidang kuasa hakim bicara dan mahkamah rayuan tidak boleh sewenang-wenangnya campur tangan.

(2) Kebiasaannya, motif untuk melakukan jenayah bukan intipati kesalahan membunuh. Walau bagaimanapun, jika boleh dibuktikan, khususnya apabila kes pihak pendakwaan bergantung sepenuhnya pada keterangan ikut keadaan, ia satu faktor penting yang harus dipertimbangkan. Dalam kes ini, kes pihak pendakwaan tidak bersandar penuh pada keterangan ikut keadaan. Kes pihak pendakwaan terbentuk daripada keterangan langsung SP6 iaitu saksi mata dan keterangan perubatan si mati yang diberikan oleh SP8, mengaitkan perayu dengan kesalahan membunuh si mati. Kegagalan mengemukakan keterangan untuk membuktikan motif jenayah kurang relevan dan penting dalam hal keadaan kes ini.

(3) Menurut SP2, kecederaan pada kepala dan muka si mati disebabkan oleh pukulan yang agak kuat dan eks. P11A mungkin telah menyebabkan kecederaan tersebut dan peluang hidup tipis. DNA profil si mati dikesan pada eks. P11A dan P7E(i). Oleh sebab eks. P7E(i) mempunyai DNA profil si mati, munasabah untuk menyimpulkan bahawa perayu mempunyai sentuhan fizikal dengan si mati. Ekshibit P11A juga mempunyai darah manusia yang disahkan oleh SP8 sebagai DNA profil si mati. Munasabah untuk menyimpulkan bahawa eks. P11A ialah

senjata pembunuhan. Keterangan SP6 mengesahkannya. Tambahan lagi, sifat kecederaan si mati menunjukkan niat perayu untuk mengenakan kecederaan badan yang serius pada si mati.

(4) Dalam pembelaannya, perayu menafikan sepenuhnya bahawa dia menyerang si mati. Dalam kata lain, apa yang dimaksudkan adalah tiada sentuhan berbentuk kekerasan atau fizikal antaranya dengan si mati. Dalam keadaan ini, kemabukan perayu, jika pun ada, tiada kaitan dengan kematian si mati. Oleh itu, hujahan perayu dalam pembelaannya tidak mewajarkan hakim bicara mempertimbangkan isu kemabukan perayu. Tiada ketidakadilan berlaku terhadap perayu dalam kes ini.

(5) Sama ada kesalahan adalah mematikan secara salah atau membunuh bergantung pada tahap risiko pada nyawa manusia. Sekiranya kematian barang kali berlaku, ia kematian secara salah. Sekiranya kematian berkemungkinan besar berlaku, ia adalah membunuh. Berdasarkan kecederaan si mati dan hal keadaan kesalahan tersebut dilakukan, tiada alasan meyakinkan untuk mengurangkan pertuduhan asal membunuh kepada tuduhan mematikan secara salah.

Case(s) referred to:
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Lim Hean Chong v. PP [2012] 2 CLJ 1046 CA ***(refd)***
PP v. Megat Shahrizat Megat Shahrur [2011] 8 CLJ 893 FC ***(foll)***
PP v. Sarjit Kaur Najar Singh [1998] 5 CLJ 609 HC ***(refd)***
Tan Buck Tee v. PP [1961] 1 LNS 130 HC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(foll)***
Wan Marzuki Wan Abdullah v. PP [2008] 4 CLJ 631 CA ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304(a)

For the appellant - Karthigesan Shanmugam (Mazlinda Mahmud with him); M/s Karthig Shan
For the respondent - Tengku Intan Suraya Tengku Ismail; DPP

[Appeal from High Court, Seremban; Criminal Trial No: 45B-3-09-2013 (affirmed)]

Reported by Najib Tamby

JUDGMENT

Zamani A Rahim JCA:

Introduction

[1] Arumugam a/l Ramadas, the appellant was charged and tried before the High Court of Seremban for an offence of murder of Ramadas a/l Saniasi, ('the deceased') under s. 302 of the Penal Code. The charge reads:

Bahawa kamu pada 10.3.2013, jam lebih kurang 7.00 malam di Lot 73A, Kampung Kuala Lukut, di dalam Daerah Port Dickson, di dalam Negeri, Negeri Sembilan telah melakukan kesalahan bunuh menyebabkan kematian ke atas Ramadas a/l Saniasi (570810-08-6331) dan dengan demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] At the end of the trial, the appellant was found guilty, convicted and sentenced to death by the High Court Judge. Hence this appeal.

The Prosecution's Case

[3] The appellant was the son of the deceased and the grandson of Seman Chellam a/p Appana (SP6). The appellant and SP6 lived at Lot 73A, Kampung Kuala Lukut, Port Dickson. It was also the scene of the murder.

[4] According to SP6, she was at home with the deceased and the appellant. The appellant and the deceased were quarreling. The appellant grabbed a piece of wood, exh. P11A and hit the deceased with it. SP6 witnessed the assault. As she was fearful, SP6 ran out of the house. She did not know how many times the appellant struck the blows on the deceased with exh. P11A.

[5] Thanabalan a/l Ramur Murthy (SP10) was the appellant's cousin and the deceased was his uncle. On the day in question, he went to the deceased's house. When SP10 arrived there, he noticed the deceased sprawling on the floor covered with blood. SP10 then called SK Siamala a/p Kandasamy (SP7) who was the sister-in-law of the appellant. SP10 asked SP7 to return home.

[6] In the meantime, SP10 walked around the house to see whether anyone was in the house. From outside the house, SP10 noticed the appellant was in the room. He called the appellant out of the room. SP10 enquired from the appellant whether he had assaulted the deceased. The appellant denied. However, SP10 noticed that the appellant's hands and trousers were smeared with blood. Again SP10 questioned the appellant whether he had beaten the deceased and this time the appellant replied he did.

[7] Yap Chow Wun (SP4) was the neighbour who lived adjacent to the deceased's house. According to SP4, he was watching TV when he heard his neighbours were quarrelling. SP4 noticed the appellant was trading blows with Nugulan. A short while later, SP7 arrived home. She immediately called the ambulance as the deceased was bleeding profusely.

[8] Meanwhile Cons Muhammad Din bin Omar (SP5) and Cons Sharipudin bin Ruslan were on patrol duty when they were summoned to the scene. Upon arrival, SP5 went into the house. He met the appellant sitting on the bed, staring into empty space. SP5 identified himself to the appellant and at the same time requested for the appellant's identity card. The

A appellant took his identity card from the cupboard and gave it to SP5. SP5 enquired from the appellant the condition of the deceased. The appellant replied that the deceased was in grave condition.

[9] SP7 went to look for SP6 who ran out from the house. SP7 met SP6 at a nearby temple. SP6 told SP7 that the appellant had a fight with the B deceased, and that the appellant had hit the deceased with a piece of wood, exh. P11A.

[10] The wood, exh. P11A was stained with the blood. Exhibit P11A was identified by SP6 as the weapon used by the appellant to hit the deceased's head.

C **[11]** The deceased's body was removed to Port Dickson Hospital where the post-mortem was conducted by a forensic consultant, Dr. Sharifah Safoorah bt Syed Alwi Al-Aidrus (SP2). On an external examination, SP2 found the following marks of trauma on the deceased:

Marks of trauma

D

(a) Right periorbital haematoma;

(b) Left lateral aspect of eyebrow, laceration, 4.3cm x 0.4cm;

(c) Left upper eyelid, abrasion, 2.7cm x 0.3cm

E (d) Left cheek, laceration, 4.8cm x 0.6cm x 4.0cm exploration of the wound showed the underlying fractured maxilla and nasal septum;

(e) Left side nose, laceration, 0.9cm x 0.5cm

(f) Left side of face, near ear abrasion, 2.0cm x 1.5cm;

F (g) Left ear, lower pole laceration, 1.5cm x 0.6cm;

(h) Left side of head, parietal region linear abrasion, 1.9cm x 0.3cm with bruise of 1.7cm x 1.6 cm;

(i) Posterior aspect of the left ear, abrasion with bruise, 5.2cm x 4cm;

G (j) Left side of neck minute abrasions (5);

(k) Left back of shoulder linear abrasion, 2.6cm x 0.4cm;

(l) Right elbow two bruises, 3.0cm x 1.7cm and 1.5cm x 1.4cm;

(m) Left elbow bruise, 1.8cm x 1.0cm;

H

(n) Dorsum of left hand, medial laceration, 4.5cm x 1.0cm and another lateral, 2.0cm x 0.6cm, exposing the tendons.

On internal examination, the injuries that were seen were, *inter alia*:

I Head

The scalp showed subgaleal haematoma on the left temporal region. There was also bilateral temporalis muscle haematoma.

Neck

Both carotids showed streakes of atheroma. The hyoid bone showed fracture of both horns with associated tissue haematoma.

Thorax

The ribcage showed fracture of the sternum at T4 level. There was also intercostals muscle bruise involving the left eighth and ninth ribs. The opened bronchial tree contained blood. Serial sections of the lung parenchyma showed 'leopard skin appearance' of inhaled blood. The tracheal cartilages and oesophageal mucosa contained blood.

[12] SP2 opined that the cause of death was due to blockage of the trachea as a result the deceased's bleeding and inhaling the blood which was caused by considerable force of blunt trauma to the deceased's face.

[13] Police investigation revealed that during the fight the appellant was wearing a pair of jeans of Texas Blue brand, exhs. P7E(i). Exhibits P7E(i) and P11A were recovered at the instance of the appellant. The government chemist, Siti Mastura bt Mohamed (SP8) confirmed that the DNA profile of the deceased was detected on the exhs. P7E(i) and P11A.

Defence Case

[14] The appellant gave evidence on oath. On the day in question, the deceased and SP6 were at home at Lot 73A, Kampung Kuala Lukut, Port Dickson.

[15] According to the appellant, he was drinking liquor outside the house. He heard the deceased fell down three times on the floor inside the house. The deceased's head hit the wooden table which caused the table to break partially.

[16] The appellant continued drinking. After a while, the appellant got up and noticed the deceased was lying on the floor covered with blood. He did not render any assistance to the deceased. The appellant went into the room and closed the door. His grandmother, SP6 was in the room. The appellant slept.

[17] The appellant denied that he hit the deceased with the wood, exh. P11A. The appellant, however, claimed that he was in an intoxicated state.

The Appeal

[18] Before us, counsel for the appellant canvassed four grounds of appeal. They were as follows:

(a) SP6 was not a credible witness;

(b) the appellant had no motive to kill the deceased: see *PP v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609; [1998] 1 MLJ 184;

A (c) there was insufficient evidence to link the appellant with the wood, exh. P11A; and

(d) both the appellant and the deceased were intoxicated at the time of the deceased's death: see *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359; [2007] 2 MLJ 130.

B

[19] Alternatively, having regard to the facts and circumstances of the case, counsel for the appellant prayed that the original charge of murder under s. 302 of the Penal Code be reduced to one of culpable homicide not amounting to murder under s. 304(a) of the same Code.

C **Our Decision**

[20] We propose to deal with the issues, not necessarily in the order or sequence, raised by the appellant's learned counsel.

[21] The first issue - according to SP6, both the deceased and the appellant D were quarrelling but no evidence was adduced as to the reason or cause why they quarrelled. As such learned counsel argued that the appellant had no motive to kill the deceased.

[22] Ordinarily, a motive for committing a crime is not an ingredient of the offence. If, however, it can be established, especially where the prosecution's E case is based solely on circumstantial evidence, it is an essential factor that ought to be considered. In the case of *Lim Hean Chong v. PP* [2012] 2 CLJ 1046; [2012] 1 MLJ 149, the Court of Appeal said:

> Although in general motive of a crime is not an essential factor that ought to be considered, but where the prosecution's case is based solely on F circumstantial evidence, motive is important in such cases to tilt the scale against the accused. In *Ratanlal and Dhirajlal Law of Crimes*, (24th Ed), Vol. 22 at p. 1448, the learned author articulated:
>
> > … Ordinarily, when there is sufficient, direct and circumstantial, evidence connecting the accused with the commission of the G offence the proof of motive become unimportant. But where the entire prosecution case rests on circumstantial evidence, motive undoubtedly plays an important part in such cases to tilt the scale against the accused …

[23] In this case, the prosecution's case does not rest entirely on H circumstantial evidence. The prosecution's case consisted of direct evidence of SP6 who witnessed the assault on the deceased by the appellant, the medical evidence of the deceased given by the forensic consultant, SP2, the scientific and forensic evidence of the government chemist, Siti Mastura bt Mohamed (SP8) connecting the appellant with the commission of murder of the deceased. A non-production of the evidence to prove the motive of the I crime is not really relevant and important in the circumstances of this case.

[24] The first and third issues are dealt with together. It is undeniable that SP6 is the sole eye witness in this case. At the beginning of her evidence in examination-in-chief, SP6 said the deceased sustained his injuries as he fell down three times with his face smashed ("tersembam") on the floor.

[25] Learned Deputy then applied the case to stand down for SP6 to refresh her memory, though this procedure appears to be improper. On resumption, SP6 changed her testimony by saying that the deceased was assaulted by the appellant with a piece of wood, exh. P11A. SP6 was asked to identify the exh. P11A.

[26] SP6 was, however, recalled to identify the wood, P11A: see p. 61 of the appeal record, vol. II where she testified in examination-in-chief as follows:

S: Semalam aunty ada kata Arumugam (i.e. appellant) pukul Ramadas (i.e deceased) dengan kayu

J: Ya

S: Kalau saya tunjukkan boleh cam tak?

J: Boleh

S: Adakah kayu ini yang digunakan?

J: Ya

ID11A dicamkan

[27] In cross-examination at p. 62 of the appeal record, vol. I, learned counsel sought to lead SP6 to say that she could not identify the wood, exh. P11A being the weapon used to assault the deceased. The question and answer in cross examination run as follows:

S: Setuju dengan saya kalau saya katakan, puan sendiri tidak pasti sama ada, ada kayu digunakan oleh ….

J: Memang ini kayu yang digunakan untuk pukul Ramadas (i.e deceased). Arumugam (i.e appellant) bila angkat kayu itu, saya dah lari dari rumah.

[28] In re-examination at p. 62 of the appeal record, vol. I, SP6 said that she was scared when the appellant quarreled with the deceased. She did not see the appellant hit the deceased as she ran out the house. With the assistance of the interpreter, with much difficulty, the trial judge sought the confirmation from SP6 whether she saw the appellant assaulted the deceased. At p. 65 of the appeal record, vol. I, the record of proceedings read, *inter alia*, as follows:

Mahkamah

- Dia nampak atau tidak pukul?

J: Masa dia pukul itu dia lari

- Nampak atau tidak dia pukul?

A J: Nampak dan dia lari

- Lagi sekali saya tanya, nampak atau tidak dia pukul?

J: Ya, saya ada nampak dia pukul

[29] Be that as it may, according to SP2, the injuries to the head and face
B of the deceased were inflicted with considerable force as the hyoid bone was fractured on both horns and the rib cage was also fractured at the sternum at T4 level. SP2 also opined that the wood, exh. P11A, could have caused the injuries and the chances of survival were slim.

[30] The government chemist, SP8 had conducted the DNA analysis on the
C wood, exh. P11A and a pair of jeans of Texas Blue brand, exh. P7E(i). SP8 confirmed that the DNA profile of the deceased was detected on the exhs. P11A and P7E(i). There was evidence that the exh. P7E (i) was the appellant's jeans which was worn by him at all material time. As exh. P7E(i) was stained with the DNA profile of the deceased, it is reasonable to infer
D that the appellant had come into physical contact with the injured deceased. This is supported by the evidence of SP10 who noticed the appellant's hands were stained with blood.

[31] The exh. P11A was also stained with human blood which SP8 confirmed to be that of the DNA profile of the deceased. The exh. P11A was
E recovered at the instance of the appellant. Therefore, it is reasonable to conclude that exh. P11A was the murder weapon. The evidence of SP6 confirmed this.

[32] SP6 is no doubt an important eye witness for the prosecution. When giving evidence, she was placed between the devil and the deep blue sea. The
F deceased was her son, whilst the appellant was her grandson. The trial judge had evaluated and considered her evidence carefully. At p. 208 of the appeal record, vol. 2, the trial judge wrote:

> I have given due consideration and evaluated the evidence of PW 6. Although she did give contradicting versions on the material aspect of the
G case, she did salvage her evidence after being questioned further in re-examination. I find that her evidence can be accepted as trustworthy.
>
> In any event, her evidence is also supported by the evidence of PW7 to whom she had informed that the Accused did hit the deceased.

H And at pp. 222 to 223 of the same appeal record, the trial judge wrote:

> Applying the principle stated in the above case, the evidence of PW 6 and PW 10 have been tested through vigorous cross examination and was found to be consistent with the flow of the other evidence of the prosecution witnesses and the circumstances of the case.
>
> I Therefore, after giving a maximum evaluation of the evidence of the prosecution witnesses, I found that they are credible witnesses and there is no reason for them to lie as to the incident.

[33] The trial judge had carried out a maximum evaluation of the evidence adduced by the prosecution, including the evidence of SP6. SP6's evidence was found to be trustworthy and credible. This is a question of fact involving the credibility of a witness. It is within the province of the trial judge and the appellate court is slow to intervene: In the case of *Wan Marzuki Wan Abdullah v. PP* [2008] 4 CLJ 631, the Court of Appeal observed as follows:

> In our judgment the judge was certainly entitled to do that. On the facts of this case he was justified in so doing. There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to **issues of credibility, this court will be reluctant to interfere with the findings made by the primary trier of fact.** (emphasis added)

[34] Further, in the present appeal, we were of the view that the nature of the injuries sustained by the deceased showed the intention of the appellant to cause serious bodily injury to the deceased. In *Tan Buck Tee v. PP* [1961] 1 LNS 130, Thompson CJ said:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must, have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted. There was no evidence as to the circumstances surrounding the killing. No question of insanity or provocation or self-defence or anything else was raised by the defence. There was not a scrap of evidence with which any such defence could be even remotely linked up. The only question for the jury to consider was whether they were satisfied beyond reasonable doubt that it was the appellant who inflicted the injuries. If they were so satisfied then it was their duty to say he was guilty of murder. If they were not so satisfied then it was their duty to say he was not guilty. **In these circumstances it would have been quite adequate had the judge merely told the jury that murder is the deliberate killing by one human being of another, that is killing with the intention to kill.** (emphasis added)

[35] *Tan Buck Tee*, (*supra*) was referred to in *Duis Akim & Ors v. PP* [2013] 9 CLJ 692 where the Federal Court observed as follows:

> [26] Now, element (d) deals with *mens rea*. It is settled law that for the offence or murder the *mens rea* element can be imputed from the injuries inflicted upon a deceased.
>
> [27] In *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 the then Federal Court said this at pp. 176, 177:
>
> > The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

[36] The fourth issue - the trial judge has failed to consider that at all material time the appellant and the deceased were intoxicated. Because of his intoxication, he did not know what he was doing and neither did he run away from the scene of the murder.

[37] In the instant case, the appellant's defence was that he totally denied assaulting the deceased with the wood, exh. P11A. In other words, what he was saying was that there was no violent or physical contact between him and the deceased. That being the case, the appellant's drunkenness, if any, has no connection with the death of the deceased. Thus, the stand taken by the appellant in his defence does not warrant the trial judge to consider the issue of the appellant's intoxication. No miscarriage of justice has occasioned upon him in the circumstances of this case.

[38] Finally, as regard to learned counsel's plea that in the circumstances of this case, we ought to find a case of culpable homicide against the appellant. In determining whether the appellant's act in assaulting the deceased is one of murder or one of culpable homicide, we stand guided by the Federal Court case of *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893 wherein the case of *Tham Kai Yau & Ors*, (*supra*) was referred to. It was held that "whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is the likely result, it is culpable homicide, if death is the most probable result, it is murder".

[39] Applying the test in *Tham Kai Yau & Ors*, (*supra*), and based on the serious injuries sustained by the deceased and the circumstances under which the offence was committed, we found no cogent reasons to reduce the original charge of murder to a lesser charge of culpable homicide under s. 304(a) of the Penal Code as pleaded by learned counsel.

Conclusion

[40] We agreed with the trial judge that Her Ladyship had directed herself correctly when she found the prosecution had proved its case against the appellant beyond reasonable and the appellant had failed to raise any reasonable doubt on the prosecution's case.

[41] For the reasons stated above, we dismissed the appeal and affirmed the conviction for murder and the sentence of death imposed by the High Court.